IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX REFERENCE NO. 352 OF 1988.

The Commissioner of Income-tax,
Bombay City VIII ... Applicant.

V/s.

M/s Ratilal Bacharilal & Sons ... Respondent.

Shri Prayag Vyas i/b K.C.Sidhwa for the applicant.

Shri P.C.Tripathi for the respondent.

CORAM : V.C.DAGA AND A.S.AGUIAR, JJ.

DATED : 22.7.2005

JUDGMENT: (Per V.C.Daga,J.)

. By this reference under section 256(1) of the Income-tax Act, 1961, the Income Tax Appellate Tribunal has referred the following questions of law for the opinion of this Court:

1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in holding that the Commissioner of Income-tax (Appeals) expressly or impliedly applied his mind on the issue of the allowance of relief under section 35B on reassortment charges when the claim for deduction on this account had already been allowed by the Income-tax Officer in the assessment order and consequently did not figure in the appeal before the Commissioner of Income-tax (Appeals).

2. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in holding that after an appeal was decided by the Commissioner of Income-tax (Appeals) against the assessment order, the assessment order merged in the order of

the Commissioner of Income-tax (Appeals) and thereafter the Commissioner of Income-tax could not exercise his jurisdiction under section 263 of the Income-tax Act, 1961 for revising the assessment on the ground of its being erroneous and prejudicial to the interest of the revenue.

FACTS:

2. The factual matrix reveals that the assessee is a registered firm. The assesment for the 1980-81 was made by the Income-tax Officer by assessment order dated 23.2.1981. In the said assessment order, the I.T.O. allowed weighted deduction under section 35-B on Rs.5,63,350/- instead of Rs. 8,90,676/- claimed by the Assessee.

3. Appeal was preferred against the said assessment order which was decided by the Commissioner of Income-tax(Appeals) by order dated 25.11.1981 upholding the order of the I.T.O.

4. Subsequently, the Commissioner of Income-tax was of the view that the assessment order dated 23.2.1981 was erroneous and prejudicial to the interest of the Revenue inasmuch as weighted deduction under section 35B was allowed on reassortment charges without going into the details of these charges and enquiry as to whether these charges were justified so as to allow weighted deduction under section 35-B of

the Act. The Commissioner of Income-tax, finding the order erroneous and prejudicial to the interest of the Revenue, in exercise of his powers under section 263, by an order dated 11.1.1983, set aside the assessment order dated 23.2.1981 with respect to the claim made by the assessee for weighted deduction under section 35-B and remanded the assessment proceeding to the I.T.O. with direction to make the assessment afresh, keeping in view his observations made in the order, after giving sufficient opportunity to the assessee to meet its case before completing the assessment.

5. Being aggrieved by the aforesaid order of the Commissioner of Income-tax under section 263, dated 11.1.1983, the assessee invoked appellate jurisdiction of the Tribunal, contending that the powers under section 263 could not have been invoked by the Commissioner of Income-tax since the assessment order with respect to the weighted deduction under section 35-B was a subject matter of appeal before the C.I.T. (Appeals) as such order in original merged in the order of the appellate authority. The Tribunal came to the conclusion that the Commissioner of Income-tax (Appeals) having expressed its views impliedly applied its mind to the question of grant of allowance under section 35B. The Tribunal, further held that assessment order passed by the I.T.O. emerged in the order of the Commissioner of Income-tax (Appeals) and,

therefore, Commissioner of Income-tax could not have assumed jurisdiction u/s 263 of the Income-tax Act so as to revise the assessment order, on the ground of it being erroneous and prejudicial to the interest of the revenue.

6. The Appellate Tribunal, on the above findings, cancelled the order of the Commissioner under section 263 and allowed the appeal of the assessee-firm.

7. Based on the above facts, questions of law as extracted in the opening part of this order are the subject-matter of this reference made under section 256 (1) at the instance of the Revenue for the opinion of this Court.

Submissions:

8. Learned Counsel appearing for the Revenue Shri Kotangale submitted that the assessee could not have preferred appeal against that part of the order which was in favour of the assessee. The assessee could not be said to be aggrieved by that part of the order which was in favour of the assessee. In otherwords, he submits that weighted deduction which was allowed on Rs. 5,63,350/- could not have been the subject matter of appeal before the C.I.T.(A), the first appellate authority. He submitted that at the most it

was open for the assessee to contend before the appellate Tribunal that the weighted deduction under section 35B of the Income-tax Act ought to have been allowed on the excluded part of the reassortment charges amounting to Rs. 3,27,326/- and that disallowance to that extent was erroneous.

9. Shri Kotangale, submits that the Tribunal was not justified in invoking doctrine of merger and could not have set aside the order of the Commissioner of Income-tax passed under section 263.

10. Per Contra, learned Counsel appearing for the assessee submitted that once the opinion is expressed by the C.I.T. (A) on the weighted deduction under section 35-B with respect to the reassortment charges, then the jurisdiction under section 263 for revising assessment order on the ground of it being erroneous and prejudicial to the interest of the Revenue; was not available to the C.I.T.(A).

Consideration:

11. Having heard the rival parties, it appears that the main contention of the assessee, which was considered by the C.I.T.(A), was whether or not the assessee was still entitled to claim weighted deduction on the entire amount of Rs.8,90,676/-

instead of Rs. 5,63,350/-. In otherwords, whether or not the I.T.O. was justified in refusing to allow weighted deduction on Rs. 3,27,326/-, was the question raised before the 1st appellate Court. However, in view of the judgment of this Court in the case of C.I.T. vs.P. Muncherji & Co. (1987) 167 ITR 671 (Bom.) once the order of assessment is confirmed by the appellate Court or any order with regard to assessment has been made by it, that becomes a final order of assessment and only right the department has is the right of appeal to the Appellate Tribunal. In otherwords, whether or not the issue is raised, once the assessment order is carried in appeal, the entire order merges with the appellate order. However, this legal position stands abrogated in view of the amendment to section 263 of the Act, as amended by Finance Act, 1989. It has, thus, become necessary to examine the effect of this amendment to section 263 of the Act.

12. Amendment to section 263 of the Income-tax Act, 1989, has been made by FINANCE ACT, 1989 with retrospective effect w.e.f. 1st June, 1988. Relevant part of the amendment reads as under:

> "Explanation- For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,-
>
> (C) Where any order referred to in this sub-section and passed by the Assessing

> Officer had been the subject-matter of any appeal filed **on or before or after** 1st June 1988, the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal." (Emphasis supplied)

13. This Court while dealing with scope of amendment to section 263, in **Ritz. Ltd. vs. Union of India (1990) 184 ITR 599 603 (Bom.)** ruled that only in cases where action under section 263 is taken on or after 1st June, 1988, the merger of the assessment order in the appellate order will be treated as confined to the issues actually considered and decided in appeal in terms of clause (c) of the newly substituted (w.e.f. 1.6.1988) Explanation to section 263 (1). In that view of the matter, where the action under section 263 is taken prior to 1st June 1988, the provisions of said clause (c) of the Explanation cannot be invoked because irrespective of the language in which the amending provisions are couched, the amendment cannot be retrospective with effect from a date earlier to the date on which the amended provision itself was brought on the statute book. The similar view has been reiterated by this Court in number of cases viz. **C.I.T. vs. International Computers Indian Manufacturer Ltd., (1991) 187 ITR 580 (282) (Bom.) ; C.I.T. vs. Godavari Sagar Mills Ltd. (1992) 198 ITR 196.200-01(Bom.); C.I.T. vs. Bombay Burmah Trading Corporation Ltd (1992) 107 CTR**

(Bom.)53,54;

. Some of the leading High Courts have taken a contrary view. Let us notice the same.

14. According to the Calcutta High Court, the said clause (c) has tried to make explicit what was already implicit in the Act (see Hindustan Aluminium Corporation Ltd. vs. C.I.T. (1989) 178 ITR 74,93 (Cal.). The very same High Court has further held that the amendment to clause (c) by the Finance Act, 1989, clarifies that the said clause (c)must be deemed to have always been in existance (see Hamilton & Co. Pvt. Ltd. vs. C.I.T. (1991) 187 ITR 568 (Cal.). Thus, according to Calcutta High Court the doctrine of partial merger has judicial recognition for quite long. This clause (c) is no innovation of Parliament (see C.I.T. vs.Techno Electric & Engg.Co. (1994) 76 Taxman, 212, 220 (Cal.).

15. According to Delhi High Court such amendment to section 263 clarifies the law and brings the Statutory Law in conformity with the judicial opinion noticed in the judgment of the Calcutta High Court. (see CIT vs. Printers House (1998) 233 ITR 666, 669 (Del).

16. According to Patna High Court clause (c) is

retrospective in nature. It also includes an appeal filed on or before or after 1.6.198 (see CIT vs.Magbool Alam & Co. (1998) 231 ITR 77, 80 (Patna).

17. At this juncture, it will be useful to refer to the portion of the departmental Circular No.550 dated 1st January 1990 which reads as under:

> "The above Explanation was incorporated in the Finance Act,1998, to clarify this legal position to have always been in existence. Some appellate authorities have, however, decided that the Explanation will apply only prospectively, i.e. only to those orders which are passed by the Commissioner after 1st June 1988. Such an interpretation is against the legislative intent and section 263 of the Income-tax Act has been amended so as to clarify that the provisions of the Explanation shall be deemed to have always been in existence."

18. In the case of **C.I.T. vs. Shri Arbuda Mills Ltd.(1998) 231 ITR 0050**; the apex Court also had an occasion to consider above issue. The relevant facts reveal that the assessment year in that case was 1975-76 ending on 31.12.1974. The assessment was completed under section 143(3) r/w section 144-B, on March 31, 1978 in which net business loss was computed at Rs. 3,61,086/- and the income under the head "Capital gains" at Rs. 38,874/-. The Income-tax Officer had made certain additions and disallowances while computing the loss and income as above and had also accepted, inter alia, the following three claims:

(i) Deduction of a sum of Rs. 23,82,621/- by way of provision for gratuity.

(ii) Depreciation on Rs. 4,21,000/-which was paid by the assessee to United Textile Industries as consideration for transfer of installed property of 17,480 spindles and 400 looms of Old Manek Chowk Mills;

(iii) Loss on account of difference in exchange rate which was referable to the purchase of machinery, etc. as revenue expenditure. For the purposes of the present matter, it is only these three items of claim which are relevant.

. In the appeals filed by the assessee, the items in respect of which the decision was in its favour were not the subject-matter of appeals. In respect of above three items, the Commissioner exercised its power under section 263 of the Income-tax Act.

. The main contention of the assessee considered by the Tribunal was whether or not the order of the Income-tax Officer regarding the said three items in respect of which the assessee had no occasion to prefer an appeal had merged in that of the

Commissioner (Appeals) so as to exclude the jurisdiction of the Commissioner of Income-tax under section 263 of the Act. The Apex Court on reference under section 257 of the Income-tax Act, 1961 was required to deal with the following question referred to it.

> "Whether, on the facts and in the circumstances of the case, the order of assessment passed by the Income-tax Officer under section 143(3) read with section 144B on July 31,1978, had merged with that of the Commissioner (Appeals) dated December 15,1979, in respect of the three items in dispute so as to exclude the jurisdiction of the Commissioner of Income-tax under section 263?"

The Apex Court while dealing with the above question applied the amended provision of section 263(1) of the Act to the aforesaid three items which were not the subject matter of appeal and held as under:

> "The consequence of the said amendment with retrospective effect is that the powers under section 263 of the Commissioner shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in an appeal. Accordingly, even in respect of the aforesaid three items, the powers of the Commissioner under section 263 shall extend and shall be deemed always to have extended to them because the same had not been considered and decided in the appeal filed by the assessee."

19. Learned Counsel appearing for the assessee tried to canvas, since there is no discussion in the aforesaid judgment of the Apex Court with respect to

the length of the retrospectivity of the amendment to section 263, it need not be followed. We do not agree with this submission made. The submission made is liable to be rejected outrightly. The Courts including High Court have to treat a decision of the Supreme Court as an authority not only for what it declares or decides by express enunciation but also what follows from such declaration by clear implication by way of logical deduction. So far as case of Shri Arbuda Mills Ltd. (supra), is concened, the pronouncement is clear on a point and suffers from no ambiguity. Needless to mention that once the point is finally decided by the Supreme Court it becomes binding precedent. The binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided. Merely because, there is no discussion in the judgment that does not mean that the issue in question was not considered by the Apex Court and that it has no binding force. On the contrary, earlier views of this Court referred to in para 13 (supra) have lost their binding force. They are no longer good law.

20. The consequence of the aforesaid clause (c) introduced with retrospective effect, is that the powers under section 263 of the Commissioner shall

extend and shall be deemed always to have extended to such matter as had not been considered and decided in the order passed in appeal on or, before or after 1.6.1988. The very fact that Explanation (c) was given retrospective effect by using the words "On or before or after" itself denotes that the intention of legislation is to embrace all orders whether passed on or after or before 1.6.1988. The use of the phrase "on or before or after" is no doubt little uncommon. The phrase "on or before" denotes immediately at or at any time before. The phrase "on or before and after" to our mind means either immediately at or in the past or future. It means at any time during the continuance of the Act, if it is to be understood in the context of the legislation.

21. Having said so, turning to the facts of this case, so far as allowance under section 35-B to the extent it was allowed by the I.T.O. is concerned, the powers of the Commissioner under section 263 shall extend and shall be deemed always to have extended to such matter because the same had not been considered and decided in the appeal filed by the assessee. At the instance of the assessee, the allowance on the sum of Rs.5,63,350/- could not have been the subject matter of appeal before the C.I.T.(A) as the assessee was never aggrieved with that part of the order. In otherwords, so far as weighted deduction under section

35-B in the sum of Rs. 5,63,350/- is concerned, the same was not a subject-matter of the appeal before the C.I.T.(A). Factually, in this case, the doctrine of merger could not have been applied by the Tribunal to that part of the order; which was not a subject matter of appeal as indicated, so as to exclude revisional jurisdiction of the Commissioner of Income-tax under section 263 of the Act.

22. In the above view of the matter, both the questions referred for our opinion are liable to be answered in the negative i.e.against the assessee and in favour of Revenue.

. Reference in terms of this order stands answered and matter stands remitted back to the Tribunal for decision in accordance with law. No order as to costs.

(A.S.AGUIAR, J.) **(V.C.DAGA, J.)**